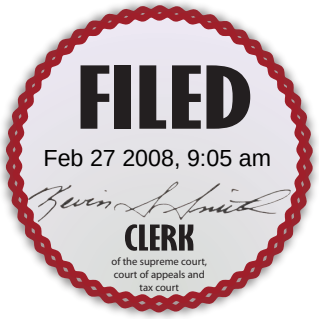

ATTORNEY FOR APPELLANT:

DAVID W. STONE IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

LOUIS RICHARD HARRIS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0606-CR-532
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0306-FA-192

February 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Louis Richard Harris, Jr., appeals his convictions and sentence for two counts of child molesting as class A felonies.[1] Harris raises three issues, which we restate as:

I. Whether the trial court abused its discretion by admitting evidence of Harris's flight from law enforcement officers;

II. Whether the prosecutor's comments during closing argument resulted in fundamental error; and

III. Whether Harris's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[2]

The relevant facts follow. Harris lived with Sheila Garrett and her daughter, D.G., born April 12, 1992, for approximately ten years. D.G. did not know that Harris was not

---

[1] Ind. Code § 35-42-4-3 (2004) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

[2] Harris included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 92-119. We remind Harris that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

her biological father and called him, "Dad." Transcript at 105. Harris and Garrett also had two sons together. In June 2003, Harris, Garrett, and the children moved from Missouri to Anderson, Indiana, where they stayed with Harris's sister, her friend, and four other children.

A few days before Father's Day in June 2003, Harris woke D.G. during the night and took her outside to the family's van. Once inside the van, Harris removed his clothes and removed D.G.'s pants and underwear. Harris then "sat [D.G.] on top of him," placed his penis in her vagina, and started moving D.G. up and down. Id. at 135. Harris stopped before he ejaculated. When he ejaculated, he tried to catch the semen with a towel, but some got on the van's seat.

On Father's Day, Harris took the children to the park while Garrett went shopping. When they returned from the park, Harris and D.G. were inside the house while the other children were playing outside. Harris told D.G. that it was Father's Day and that "it would be a good day to do it," which D.G. understood to mean having sexual intercourse. Id. at 114. D.G. refused, but Harris said, "it would be the last time until we got our own place" and "it would be like a Father's Day . . . gift." Id. at 116. Harris led D.G. to his sister's bedroom, where he removed his pants and removed D.G.'s pants and underwear. Harris then "got on top of [her]" and placed his penis in her vagina. Id. 120. D.G. "felt pain," and Harris started moving up and down on her. Id. at 122. Harris stopped and ejaculated onto his hand.

On June 16, 2003, the Madison County Office of Family and Children forwarded an inquiry from out-of-state regarding D.G.'s welfare to the Anderson Police Department.

Detective Kevin Smith located D.G. on June 19, 2003, and Detective Smith and several uniformed officers went to the residence where Harris and Garrett were living. Garrett answered the door, and Detective Smith asked if D.G. and Harris were in the residence. Garrett responded that Harris was not in the home. At that point, Harris ran out of the back of the house and escaped from the officers.

Detective Smith located D.G. at a babysitter's residence and later interviewed her at the police station. D.G. indicated to Detective Smith that Harris had molested her. Detective Smith then received a telephone call from D.G.'s babysitter, who informed him that Harris was outside of her home. Officer Mark Naselroad became involved in a high speed pursuit of Harris. The officers disabled Harris's vehicle with stop sticks, and Harris ran into some woods where he was ultimately caught by a police dog.

On June 23, 2002, a physician performed an examination of D.G. and found "clear evidence of penetrating injury." Id. at 214. Additionally, consistent with D.G.'s version of the events, Harris was identified as the source of DNA evidence taken from fabric on the van's seat.

The State charged Harris with two counts of child molesting as class A felonies, resisting law enforcement as a class D felony,[3] and driving while suspended as a class A misdemeanor.[4] On September 10, 2004, a jury found Harris guilty as charged. Harris appealed his two child molesting convictions, and this court reversed and remanded for a

[3] Ind. Code § 35-44-3-3 (2004) (subsequently amended by Pub. L. No. 143-2006, § 2 (eff. July 1, 2006)).

new trial on the child molesting charges due to the improper admission of evidence regarding an alleged molestation of D.G. by Harris in April 2003 in Missouri.[5] Harris v. State, No. 48A02-0503-CR-205 (Ind. Ct. App. Sept. 13, 2005).

On retrial, evidence of the alleged Missouri molestation was not presented. Detective Smith testified that Harris fled from the police officers at his sister's residence, and Harris did not object to this testimony. Officer Naselroad testified that he became involved in a high speed chase with Harris, that stop sticks were used to disable Harris's vehicle, that Harris ran into the woods, and that Harris was apprehended by a police dog. At the start of Officer Naselroad's testimony, Harris objected to the officer's testimony based upon Ind. Evidence Rule 404(b). The trial court overruled Harris's objection.

During closing arguments, the prosecutor stated:

> And along those lines the question that the Judge referred to about police reports of I believe you asked for notes or police reports from Detective Smith's interview of [D.G.]. And that's a good question. That it's common that jurors want to see either the video tape or how the interview was conducted of witnesses, and it's just not allowed. We didn't neglect to do something in this trial. No one is trying to hide something from you, but the rules of evidence say police reports one are not allowed into evidence. Witnesses' statements are not allowed into evidence under most circumstances, and the reason why that is is you're to base your decision on the testimony and not for statements made outside of the courtroom. That's when you hear hearsay and that's what that means. We can't play you the tape. We can't show you those police reports for that reason. So, again, you are to determine the facts based on the evidence of the case. So while those probably would be helpful, I'm sure . . . I assume the question would be how did it come about? How was it that she revealed this to him? And that's a legitimate question, but it's just not

---

[4] Ind. Code § 9-24-19-3 (2004)

[5] Harris did not appeal his convictions for resisting law enforcement and driving while suspended.

> relevant to what you're determining here today. And one thing I can guarantee you is if Detective Smith had done anything improper, if there was anything improper of his method of questioning her, or why he had her there, or anything improper about what she said to him, Mr. Reeder [defense counsel] would of [sic] brought that up. That would of [sic] been admissible. If there was a problem, you would of heard about it. There wasn't, so you've got to assume then that there was nothing wrong with that interview. It happened just like they said it did.
>
> * * * * *
>
> And I will tell you again, you didn't get to hear her statement because you couldn't. You didn't get to see the police reports because you couldn't. But if she would of said something different than what she said back then, Mr. Reeder would have been up here asking her about it. He can do that. But he didn't. Why? Because she said substantially the same thing that she said all along.

Transcript at 320-321, 329. Additionally, the prosecutor stated:

> Clear evidence of penetrating injury. Rarely do you hear that from a doctor that examines children. It's rare to find clear evidence of penetrating injury. I've been doing this . . . this is my tenth year. I've never had a doctor say that. I've done a lot of these cases. I've seen a lot of them. Hundreds of child molest cases. I've never seen this from a doctor. Where did that come from? From him putting his penis in that eleven-year-old's vagina.
>
> * * * * *
>
> He doesn't want you to care about Dale Koons' testifying. An expert for over thirty (30) years who's been dealing with these types of cases. If I wouldn't of put him on, he would of stood up here and said this woman was molested by this man and she didn't tell her mom immediately? She didn't tell someone immediately? She didn't yell and scream? That's what he would of said. I've seen it done before. That's what he would of said. I've seen it done before. That's why you put on experts to tell you the reality of these types of cases. When a child is molested, especially by a loved one, they don't tell right away. This is one of the quickest times I've ever seen someone divulge and it was only because of the circumstances of this case that Detective Smith happened to come along and pull her away from the situation and talk to her.

Id. at 330-331, 344-345. During closing arguments, the prosecutor also stated:

> And as I said before, you have to assume she's telling the truth and there's absolutely no evidence to the contrary. None. Not one bit of evidence that contradicts anything that she told you. And, in fact, all the other evidence in the case corroborates what she says.

Id. at 328. Harris did not object to any of these statements.

The jury found Harris guilty of two counts of child molesting as class A felonies. In a bifurcated proceeding, the jury also found two aggravators: (1) Harris "did commit other acts of sexual misconduct with [D.G.] other than those charged herein," and (2) Harris "was in a position of trust when he molested [D.G.]." Id. at 412. The trial court sentenced Harris to fifty years for each count of child molesting to be served consecutively for an aggregate sentence of 100 years in the Indiana Department of Correction.[6]

I.

The first issue is whether the trial court abused its discretion by admitting evidence of Harris's flight from law enforcement officers. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied.

[6] Harris was also sentenced to consecutive sentences of three years for resisting law enforcement and one year for driving while suspended.

We begin by noting that, although Harris objected to Officer Naselroad's testimony regarding the high speed chase and apprehension by the police dog, Harris did not object to Detective Smith's testimony regarding Harris's flight from his sister's residence. Consequently, Harris makes no argument concerning Detective Smith's testimony regarding Harris's flight from his sister's house.

Harris argues that the evidence of his actions after leaving his sister's residence were inadmissible under Ind. Evidence Rule 404(b) because the evidence "had no relevance unless there was evidence showing that he knew the police were after him for the offenses for which he was being tried." Appellant's Brief at 15. Indiana Evidence Rule 404(b) provides, in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident . . . ." To decide whether evidence is admissible under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003).

"Evidence of flight may be considered as circumstantial evidence of consciousness of guilt." Brown v. State, 563 N.E.2d 103, 107 (Ind. 1990). However, we noted in Cantrell v. State, 673 N.E.2d 816, 818 (Ind. Ct. App. 1996), trans. denied, that evidence of flight "has no probative force unless it satisfactorily appears that the accused fled to

avoid arrest . . . for the crime charged." (quoting Bradley v. State, 153 Ind.App. 421, 427, 287 N.E.2d 759, 762 (1972)). "The departure of the accused may have been prompted by motives consistent with innocence. He may have feared arrest for a crime totally distinct from that for which he is indicted, or he may have apprehended violence at the hands of the police." Id. (quoting Bradley, 153 Ind.App. at 428, 287 N.E.2d at 762).

Harris argues that there was no evidence that tied his flight to the molestation charges. According to Harris, "[t]here was no evidence that [he] knew that allegations of child molesting would be made by [D.G.]." Appellant's Brief at 15. Harris contends that "[h]e could have been seeking to avoid the police because of his knowledge he was driving without a valid license." Id. at 18. Harris's argument is slightly disingenuous because he was already under investigation in Missouri for molesting D.G. when the family moved to Indiana. See Harris, slip op. at 2-3. In fact, D.G.'s mother, Garrett, testified at the hearing on aggravators that, in late April 2003, she returned to their Missouri home early one day and found Harris and D.G. partially naked in a locked bedroom. She called the police, but Harris was not arrested at that time because "[h]e ran." Transcript at 395. Harris returned one or two weeks later, and the family moved to Indiana shortly thereafter. However, this evidence was excluded from the retrial, and the jury was unaware of the Missouri investigation until the bifurcated hearing on aggravators.

Assuming that the trial court abused its discretion by admitting the evidence of the high speed chase and apprehension by the police dog, we conclude that reversal is not warranted. The erroneous admission of evidence does not warrant a reversal and new

trial unless the admission affected the substantial rights of the party. Buchanan v. State, 767 N.E.2d 967, 970 (Ind. 2002) (citing Ind. Evid. Rule 103(a); Ind. Trial Rule 61). Given D.G.'s testimony, the doctor's testimony that D.G. had suffered a penetrating injury, Harris's DNA on the van's fabric seat, and the fact that the jury was aware that Harris fled from officers at his sister's residence, we conclude that the admission of evidence concerning the high speed chase and apprehension by the police dog did not affect Harris's substantial rights. See, e.g., Buchanan, 767 N.E.2d at 970 (holding that the admission of evidence of the defendant's drawings and photographs of nude or semi-nude young girls did not affect the defendant's substantial rights where the other evidence available to the jury for consideration included the victim's testimony, the statements of five adults that the victim told them essentially the same story, and the defendant's statements to FBI agents that were consistent with the victim's testimony).

II.

The next issue is whether the prosecutor's comments during closing argument resulted in fundamental error. In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Id.

Harris takes issue with three portions of the prosecutor's closing argument. We will address each argument separately.

A. Argument Not Limited to Facts in Evidence.

The police reports and D.G.'s interview with Detective Smith were not admitted into evidence during the trial. During the trial, the jury asked, "May we obtain Kevin Smith's police reports from his interview with [D.G.]?" Transcript at 318. The trial court instructed the jury that the reports were not offered into evidence and they would have to make their decision "based on the evidence that's been presented." Id. During closing arguments, the prosecutor stated:

> And along those lines the question that the Judge referred to about police reports of I believe you asked for notes or police reports from Detective Smith's interview of [D.G.]. And that's a good question. That it's common that jurors want to see either the video tape or how the interview was conducted of witnesses, and it's just not allowed. We didn't neglect to do something in this trial. No one is trying to hide something from you, but the rules of evidence say police reports one are not allowed into evidence. Witnesses' statements are not allowed into evidence under most circumstances, and the reason why that is is you're to base your

> decision on the testimony and not for statements made outside of the courtroom. That's when you hear hearsay and that's what that means. We can't play you the tape. We can't show you those police reports for that reason. So, again, you are to determine the facts based on the evidence of the case. So while those probably would be helpful, I'm sure . . . I assume the question would be how did it come about? How was it that she revealed this to him? And that's a legitimate question, but it's just not relevant to what you're determining here today. And one thing I can guarantee you is if Detective Smith had done anything improper, if there was anything improper of his method of questioning her, or why he had her there, or anything improper about what she said to him, Mr. Reeder [defense counsel] would of [sic] brought that up. That would of [sic] been admissible. If there was a problem, you would of heard about it. There wasn't, so you've got to assume then that there was nothing wrong with that interview. It happened just like they said it did.
>
> * * * * *
>
> And I will tell you again, you didn't get to hear her statement because you couldn't. You didn't get to see the police reports because you couldn't. But if she would of said something different than what she said back then, Mr. Reeder would have been up here asking her about it. He can do that. But he didn't. Why? Because she said substantially the same thing that she said all along.

Id. at 320-321, 329.

Harris argues that the prosecutor did not limit his argument to the evidence in the record. While the "prosecutor may argue both law and facts and propound conclusions based upon his or her analysis of the evidence," the prosecutor "must confine closing argument to comments based upon the evidence presented in the record." Lambert v. State, 743 N.E.2d 719, 734 (Ind. 2001), reh'g denied, cert. denied, 534 U.S. 1136, 122 S. Ct. 1082 (2002). Further, a prosecutor's final argument may "state and discuss the evidence and reasonable inferences derivable therefrom so long as there is no implication

of personal knowledge that is independent of the evidence." Warren v. State, 725 N.E.2d 828, 834 (Ind. 2000).

The prosecutor here improperly commented upon the contents of D.G.'s statement, which had not been admitted into evidence. However, we are not persuaded that the prosecutor's misconduct created "an undeniable and substantial potential for harm." Cooper, 854 N.E.2d at 835. As the State notes, the prosecutor said that the statement contained the same evidence as D.G.'s testimony. Given D.G.'s testimony, the doctor's testimony that D.G. had suffered a penetrating injury, and Harris's DNA on the van's fabric seat, the prosecutor's improper comments regarding D.G.'s statement did not create an undeniable and substantial potential for harm. See, e.g., Gasper v. State, 833 N.E.2d 1036, 1043 (Ind. Ct. App. 2005) (holding that the prosecutor's reference to bloody wash cloths, which were not admitted into evidence, did not create an impermissible persuasive effect on the jury), trans. denied.

B. Comments Regarding Prosecutor's Personal Experience.

During closing arguments, the prosecutor stated:

> Clear evidence of penetrating injury. Rarely do you hear that from a doctor that examines children. It's rare to find clear evidence of penetrating injury. I've been doing this . . . this is my tenth year. I've never had a doctor say that. I've done a lot of these cases. I've seen a lot of them. Hundreds of child molest cases. I've never seen this from a doctor. Where did that come from? From him putting his penis in that eleven-year-old's vagina.
>
> * * * * *
>
> He doesn't want you to care about Dale Koons' testifying. An expert for over thirty (30) years who's been dealing with these types of cases. If I wouldn't of put him on, he would of stood up here and said this woman was

> molested by this man and she didn't tell her mom immediately? She didn't tell someone immediately? She didn't yell and scream? That's what he would of said. I've seen it done before. That's what he would of said. I've seen it done before. That's why you put on experts to tell you the reality of these types of cases. When a child is molested, especially by a loved one, they don't tell right away. This is one of the quickest times I've ever seen someone divulge and it was only because of the circumstances of this case that Detective Smith happened to come along and pull her away from the situation and talk to her.

Transcript at 330-331, 344-345.

Harris argues that the prosecutor again improperly made arguments that were outside the evidence and based upon his claimed personal experience in prosecuting child molestation cases. As previously noted, the prosecutor "must confine closing argument to comments based upon the evidence presented in the record." Lambert, 743 N.E.2d at 734. Further, a prosecutor's final argument may "state and discuss the evidence and reasonable inferences derivable therefrom so long as there is no implication of personal knowledge that is independent of the evidence." Warren, 725 N.E.2d at 834.

Although these statements inappropriately contained the prosecutor's personal knowledge of child molestation cases and the rarity of clear evidence of penetrating injury, we conclude that reversal is not warranted. Dr. Philip Merk testified that "most of the time" children who are molested do not divulge the information "right away." Transcript at 195. Further, Dr. Merk testified that, depending upon the size and development of the child, a child could have full penetration by a penis without physical signs in an examination. However, D.G had physical signs in her examination which revealed "clear evidence of penetrating injury." Id. at 213. Major Dale Koons of the Anderson Police Department testified that it is not uncommon for victims of child

molestation to wait before informing anyone of the molestation. He further testified that, in the case of molestation by a family member, the victim "may not feel safe to be able to divulge the information." Id. at 283. Given this testimony, D.G.'s testimony, and Harris's DNA on the van's fabric seat, the prosecutor's improper comments did not create an undeniable and substantial potential for harm. See, e.g., Gasper, 833 N.E.2d at 1043.

C. Comments Regarding Harris's Failure to Testify.

During closing arguments, the prosecutor stated:

> And as I said before, you have to assume she's telling the truth and there's absolutely no evidence to the contrary. None. Not one bit of evidence that contradicts anything that she told you. And, in fact, all the other evidence in the case corroborates what she says.

Transcript at 328.[7] Harris argues that this statement is a comment on his failure to testify because only Harris could have contradicted D.G.'s version of the events.

The Fifth Amendment privilege against self-incrimination is violated "when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004) (quoting Moore v. State, 669 N.E.2d 733, 739 (Ind. 1996), reh'g denied). "However, statements by the prosecutor concerning the uncontradicted

[7] Harris also argues that the prosecutor stated: "If you believe the little girl and you have nothing else. You believe the little girl, that's enough to convict him, and how can you not believe what this girl said? One, you heard no evidence to the contrary." Appellant's Brief at 25 (citing Transcript at 406). However, the transcript does not contain this statement on page 406, and this court and the State were unable to locate the statement in the prosecutor's closing argument. See Appellee's Brief at 13 n.1.

nature of the State's evidence do not violate the defendant's Fifth Amendment rights." Id. "Rather, comment on the lack of defense evidence is proper so long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify." Id.

Here, the prosecutor focused upon the absence of evidence to contradict D.G.'s testimony and not on Harris's failure to testify. Consequently, Harris's prosecutorial misconduct argument on this issue fails. See, e.g., id. (concluding that "the deputy prosecutor's statements were well within the permissible range of fair commentary on the evidence or lack thereof and were not a comment on Dumas' right not to testify").

III.

The final issue is whether Harris's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Harris complains that he received the maximum 100-year sentence for his offenses. He argues that his sentences should be reduced and ordered to be served concurrently.

Our review of the nature of the offense reveals that Harris was in a position of trust with D.G. because he was the only father D.G. had ever known. During a bifurcated proceeding on aggravators, D.G. testified that Harris had been having sexual intercourse

with her "[p]robably two times a week" since she was eight years old. Transcript at 402. In fact, D.G.'s mother, Garrett, testified at the hearing on aggravators that, in late April 2003, she returned to their Missouri home early one day and found Harris and D.G. partially naked in a locked bedroom. She called the police, but Harris was not arrested at that time because "[h]e ran." Id. at 395. Harris returned one or two weeks later, and the family moved to Indiana shortly thereafter. Harris again had sexual intercourse with eleven-year-old D.G. in early June 2003 in the family's van during the middle of the night. He also had sexual intercourse with her on Father's Day 2003. In fact, when D.G. refused, Harris said, "it would be like a Father's Day . . . gift." Id. at 116. In sentencing him, the trial court placed significant emphasis on this statement and noted, "to sexually assault this little girl on Father's Day and to tell her this was your Father's Day present is without doubt the most evil, selfish act I have ever, ever imagined and heard of." Id. at 421.

Our review of the character of the offender reveals that Harris was thirty-one years old at the time of the offenses. Harris had already accumulated a significant criminal history. Harris has convictions for criminal conversion, operating a vehicle without financial responsibility, receiving stolen auto parts as a class D felony, operating a vehicle having never received a license, resisting law enforcement, failure to appear after release, theft as a class D felony, driving while suspended, and resisting law

enforcement.[8] Harris's character is also revealed by his actions against D.G. and his comments to her on Father's Day.

In support of his argument that his sentence is inappropriate, Harris cites Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001), in which the Indiana Supreme Court found a defendant's forty-year consecutive sentences for two counts of child molesting as class A felonies manifestly unreasonable in light of the defendant's lack of a history of criminal behavior, the fact that the molestations were identical and involved the same child, and there was no physical injury. Harris also relies upon Haycraft v. State, 760 N.E.2d 203, 214 (Ind. Ct. App. 2001), reh'g denied, trans. denied, where this court reduced a defendant's 190-year sentence for molesting his grandson to 150 years because the defendant was "some distance from [having committed] the worst offense or [being] the most culpable offender." Given Harris's criminal history, his position of trust with D.G., the fact that he abused her repeatedly over a long period of time, and his comments to her on Father's Day, we conclude that Walker and Haycraft are distinguishable. We conclude that Harris's maximum sentence is not inappropriate. See, e.g., McCoy v. State, 856 N.E.2d 1259, 1264 (Ind. Ct. App. 2006) (forty-five-year sentence for child molesting as a class A felony was not inappropriate); Robbins v. State, 839 N.E.2d 1196, 1201 (Ind. Ct. App. 2005) (maximum consecutive sentences for two counts of child molesting as class B felonies for molesting daughter was not inappropriate); Haddock v. State, 800

[8] Although the parties discussed at the sentencing hearing that Harris had one felony conviction, the presentence investigation report reveals two felony convictions.

N.E.2d 242, 248 (Ind. Ct. App. 2003) (aggregate sentence of 326 years for molesting his girlfriend's two sons, including one episode on Christmas Eve, was not inappropriate).

For the foregoing reasons, we affirm Harris's convictions and sentences for two counts of child molesting as class A felonies.

Affirmed.

FRIEDLANDER, J. concurs

RILEY, J. concurs in part and dissents in part with separate opinion

IN THE
COURT OF APPEALS OF INDIANA

LOUIS RICHARD HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0606-CR-532
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Judge, Riley, concurring in part and dissenting in part with separate opinion.

I concur in part and dissent in part. I find that the sentence of one hundred years is inappropriate in light of the nature of the offense and the character of the defendant. Although I believe that child molesting is a very serious and egregious crime, the record does not always support the maximum sentence.

In this case, Harris had one prior felony. Additionally, as in most situations of child molest, here the jury found Harris to be in a position of trust with the child. The other aggravator found by the jury was that he committed other uncharged acts of sexual misconduct other than those charged. With only one prior felony conviction, I do not find the weight of these aggravators sufficient to run the sentences consecutive.

Therefore, I find the sentence inappropriate and would order the sentences to run concurrently.